



THE 2013 NORDIC MARINE INSURANCE PLAN FOUR YEARS ON: A COMPARISON WITH ITC, DTV/ADS

Introduction

In 2013, The Nordic Marine Insurance Plan (NMIP) was published, replacing the Norwegian Marine Insurance Plan of 1996. It dates back to 1871 and it has over the years been frequently updated and adapted, notably in 1964 and 1996. A permanent Standing Revision Committee, which since 1964 has been chaired by a professor in marine insurance law at the Nordic Institute of Maritime Law in Oslo, is responsible for proposing changes to the NMIP. The current version of the NMIP 2013 is from 2016 and a new version will be adopted in 2019. The NMIP and its Commentary is available at www.nordicplan.org.

The standard terms used in England for H&M insurance are the Institute Time Clauses - Hulls 1/10/83 Cl280 (ITC) although more recent revisions exist. As they incorporate English law and jurisdiction they are subject to the Marine Insurance Act 1906, as revised by the Insurance Act 2015, save for where they expressly provide otherwise. This encompasses centuries of maritime jurisprudence as well as the expertise and guidance of the Commercial Court in London.

The International Underwriting Association of London which drafts the ITC also drafts complementary clauses to augment the ITC.

In Germany, marine insurance law is not governed by statutory provision. Historically, there existed a statutory marine insurance law, which formed Book 5 of the Commercial Code. However, during the course of the reform of German non-marine insurance law, statutory marine insurance was abolished. This left the parties to a marine insurance contract with full freedom to contract, limited only by the provisions of the wider Civil Code. Market standard in the German Hull & Machinery insurance market is still a combination of the old German General Rules on Marine Insurance of 1919 (*Allgemeine Deutsche Seeversicherungsbedingungen* – “ADS”) and the DTV Hull Clauses 1978. The latest edition is 2004, but the most commonly used in the market is the 1992 edition. In 2009 new clauses were introduced into the market by the German Association of Insurers, the DTV-ADS, with the latest edition published in 2016. DTV-ADS still do not play a significant role in the market.



In 2013, we looked at the NMIP and contrasted it with the regimes in Germany and England to seek to identify areas of interest and comparison. We are now four years on from the publication of the NMIP 2013 and the marine insurance market has moved on.

1. Development and increase of fraudulent claims

Introduction

There have been several cases in the English Courts in the past year or so which have made some commentators consider whether, in light of the low marine premiums in the London market and the general downturn in the economy that fraudulent claims were on the increase¹. Two of the most obvious cases have been the *ATLANTIK CONFIDENCE* and the *BRILLANTE VIRTUOSO*.

In the *ATLANTIK CONFIDENCE*, the principal behind the owners was found by the High Court in 2016 to have instructed the chief engineer, with the knowledge and agreement of the master, to deliberately set a fire in the store room and deliberately cause the *ATLANTIK CONFIDENCE* to sink. The *ATLANTIK CONFIDENCE* was around four times over-insured under the H&M policy, heavily mortgaged and, on the basis of the expert accountancy evidence at trial, had no prospect of ever trading her way out of the debt. In addition, several of the other ships in the fleet were in the same situation, as were the managing companies. In short, it would appear that this case was a classic scuttling in order for the principal to reduce his debt and in this case actually obtain some financial directly himself.

The *BRILLANTE VIRTUOSO* is a case where there has been no determination of liability under the insurance policies at this time. Instead, the owner's claim for a total loss has been struck out as a result of the principal's evidence in relation to disclosure being found to be a "complete invention". The principal failed on a number of occasions to provide key disclosure and when pressed could not explain to the satisfaction of the court why. Whilst the claim of the mortgagee bank is still being pursued, serious doubt has been cast on the legitimacy of the claim as a whole and the true cause of the loss.

Lastly, the Supreme Court decision in the *DC MERWESTONE* included findings that the principal of the owner had lied to the insurers in the presentation of his claim. This case can be distinguished from the others on the basis that the lie was not in relation to the existence or extent of the loss, but whether a bilge alarm had sounded - a lie which was not material to the claim being advanced. This is what is now known as the 'fraudulent device' rule and it is now law that such a fraudulent device does not preclude recovery under the policy whereas previously it would have had the effect of allowing the insurers to avoid the policy.

English law and conditions

Under English law, in order to succeed in establishing a fraudulent claim, the insurer must prove their case on the balance of probabilities. However, the burden required will be commensurate with the seriousness of the charge which in practice will not fall far short of the rigorous criminal standard of beyond all reasonable doubt.

The court has long understood that it is not usually possible for insurers to obtain any direct evidence that a vessel was wilfully cast away and that it will

not be fatal to the insurers' case that "parts of the canvas remain unlighted or blank". As a result, the court is entitled to consider all the relevant indirect or circumstantial evidence in relation to the event. This means that the court will examine the assureds' story "as a whole" and matters of "cumulative suspicion" namely matters which taken alone would not justify a finding a fraud but together have a cumulative effect of establishing beyond reasonable doubt that a fraudulent act took place.

Often assureds will seek to put forward a defence to the allegation of fraud which is improbable but theoretically or technically possible. The insurer does not have to prove that the defence is impossible – they must simply exclude a "substantial as opposed to fanciful or remote possibility that the loss was accidental". The assureds' explanation may require a series of steps to happen in sequence, each of which is improbable or highly improbable. One improbability is unlikely to justify coming to the conclusion that the event did not happen. But when there are two improbabilities, the likelihood of it happening is still more remote, and when there are three it is more remote still.

Nordic law and conditions

The issue of fraudulent claims is addressed in NMIP 2013 (version 2016) clause 5 1. There are however not many reported cases in the Nordic market that specifically concern the circumstance where the assured has acted fraudulently. This does not mean that fraud, or attempts thereof, do not exist in the Nordic market. Neither does this imply that insurers tolerate any kind of fraud. However, suspicion by insurers that the assured had acted fraudulently will rarely be brought

¹ <https://www.lloydslist.com/ll/sector/insurance/article539522.ece>
<https://www.lloydslist.com/ll/sector/insurance/article543015.ece>



to the surface in a particular claim adjustment unless the insurers have very clear evidence of such fraud. The marine insurance market has over the years been quite “soft”, and this clearly imposes a certain commercial risk on insurers to make allegations of fraud against an assured in cases where such fraud is not certain. Instead, we may see suspicions of fraud reflected by increases in premiums, or simply that the insurers decline to renew insurance policies where there are clear suspicions of fraud by their assureds.

According to NMIP clause 5-1(3), the starting point is that if the assured has acted fraudulently, then the insurer is free from liability. However, neither the clause itself nor its commentary elaborates further on the conditions for fraud to be present. The most striking example of fraud is when the assured has intentionally caused the casualty himself in order to achieve a payment from insurers. If the insurers can prove that the assured has brought about the casualty with intent, then the insurer will be free from liability according to NMIP clause 3-32.

Where the assured is suspected of fraud in relation to providing particulars and documents for the claim settlement, namely by withholding important information from the insurer, may be difficult to determine. The insurers have the burden of proving that the assureds failures to fulfil these duties are fraudulent. This issue will have to be determined by the general rules of the Nordic laws. Generally, the burden of proof will be strict on the insurers. The considerations will be along the same lines as under English law, but the courts will be reluctant to label the assured as fraudulent unless solid evidence to that effect is presented. It is also a requirement to show that the assured’s failure to fulfil its duties was deliberate with the purpose of achieving a better claim adjustment than the assured would

have been entitled to if those duties had been properly fulfilled.

If fraud can be proven, NMIP clause 5 1(3) provides that the insurer may also cancel any insurance contract it has with the assured on 14 days’ notice. This implies that an entire fleet cover can be cancelled if there is a fraudulent claim in relation to one vessel.

German law and conditions

The German conditions do not contain an express stipulation as to fraudulent claims. Therefore, fraudulent claims are in practice dealt with exclusively on the basis of the general law. This might be why no fraud cases have been reported in Germany in recent times. The most famous case dates back to 1977, the so called *AUSTRIAN LACONA* case. In this case, a vessel was sunk in the Indian Ocean by a bomb planted by an Austrian who had insured the cargo for US\$20 million on the basis that it was expensive uranium mining equipment when, in fact, it was scrap. The Austrian was never paid for the fraudulent cargo claim put advanced.

In order to forfeit the policy and/or the claim, it is the assured who must act fraudulently and the fraudulent act must be causative of the loss. When alleging fraud, the insurer must establish with a considerable degree of probability that the claim is fraudulent.

The rules of relevance in the context of fraudulent claims are:

- The pre-contractual disclosure obligations (clauses 19 – 22 ADS; 22 clause 20 DTV-ADS).
- The obligation not to willfully alter the risk (clause 23 – 27 ADS; 11 DTV; clause 24 DTV-ADS).
- The obligation to correctly present the claim and the sue and labor (clauses 40 – 44 ADS, 43 – 49 DTV-ADS).

- The willful misconduct rule (clause 33 ADS; clause 34 DTV-ADS).

Furthermore, the duty of utmost good faith, expressly stipulated in clause 13 ADS and clause 15 DTV-ADS forms the basis for the right to terminate the contract in cases of fraudulent claims. In this context, the contractual right of recession (sec. 123 German Civil Code) is also important.

Finally, tort law may become relevant if the fraudulent acts also constitute a criminal offence, thus providing the insurer with a further right to deny payment (the *dolo agit* defence).

2. Duty of fair representation as opposed to the duty of disclosure under the Nordic plan and ADS/DTV-ADS

Introduction

The new Insurance Act 2015 in England has introduced a new duty of fair representation in relation to the pre-contractual negotiations between the assured and the insurer.

English law and conditions

The Insurance Act 2015 came into force on 12 August 2016. It applies to all contracts of insurance, reinsurance and retrocession and therefore includes marine insurance contracts entered into after that date. It was intended to materially change the business of insurance in the UK (including Scotland, Wales and Northern Island).

One of the key changes introduced is the duty of fair presentation. This applies to business contracts only and re-characterises the duty of utmost good faith in pre-contractual negotiations. Previously the duty of utmost good faith comprised of the duty to not to make misrepresentations



and the duty to disclose all material matters to the insurer. A key change is that whilst an assured may still disclose all material matters to the insurers, if they do not they can rely on having provided sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal what may be a material circumstance. Putting the insurer on notice in this way positively discharges that assured's duty of fair representation and transfers the burden to make enquiries to the underwriter. However, the disclosure given must be reasonably clear and accessible and not a 'data dump' leaving it to the insurer to try and sift through the data to establish what maybe material. Failure to do so could be an actionable breach by the insurer.

Previously an assured need not disclose anything which forms the subject of a warranty because under the old law, a breach of warranty results in the underwriter being discharged from liability as of the date of the breach. However, the new act changes a breach of warranty to that of a suspensory condition and as such the insurer is afforded less protection. As a result, under the new Act an assured's disclosure must extend to matters which may form the subject of a warranty.

Nordic law and conditions

The duty of disclosure of the person affecting the marine insurance is regulated in detail under NMIP chapter 3 section 1. The scope of the duty of disclosure is clearly set out in clause 3-1:

"The person effecting the insurance shall, at the time the contract is concluded, make full and correct disclosure of all circumstances that are material to the insurer when deciding whether and on what conditions he is prepared to accept the insurance."

It also follows from the same clause that if the person effecting the insurance subsequently becomes aware that he has given incorrect or incomplete information regarding the risk, he shall without undue delay notify the insurer. However, according to clause 3 5, the insurer may not plead that incorrect or incomplete information has been given if, at the time when the information should have been given, the insurer knew or ought to have known of the matter.

An important feature of the NMIP conditions is that the assured has an active duty to disclose information to the insurers. This is contrary to general Nordic insurance contract law, under which the assured only has a duty to respond to the requests by the insurers, and only in exceptional cases a duty to actively provide particular information. It has, however, been deemed that in marine insurance it is more appropriate to impose an active duty on the assured to disclose information. The person effecting the insurance is usually a professional who is presumed to have knowledge about what kind of information the insurers require. Most marine insurances are entered into with the assistance of brokers, and the ship owners themselves are also presumed to have knowledge and experience with regard to what is required and necessary for the insurers to know when accepting the risk.

The legal effects of the assured breaching his duty to disclose information is regulated by NMIP clauses 3 2 to 3 4. If the failure to fulfil the duty of disclosure is fraudulent, then the insurance contract is not binding on the insurer and the insurer is also entitled to cancel other insurance contracts it has with the person by giving 14 days' notice (see clause 3.2). On the other hand, an innocent breach of the duty of disclosure is regulated by clause 3.4. This clause

states that if the person effecting the insurance has given incorrect or incomplete information without any blame attaching to him, then the insurer is liable as if correct information had been given. However, the insurer may in these circumstances cancel the insurance by giving 14 days' notice. Other failures to fulfil the duties of disclosure are regulated by clause 3.3. If it is deemed that the insurer would not have accepted the insurance if the person effecting the insurance had made a correct disclosure, then the insurance contract is not binding on the insurer. On the other hand, if it can be assumed that the insurer still would have accepted the insurance, but on other conditions, then the insurer shall only be liable to the extent that it is proved that the loss is not attributable to the information the person effecting the insurance should have disclosed. It is for the insurer to prove that it would either have not accepted the insurance or would have accepted the insurance on other conditions if the duty of disclosure had been fulfilled correctly.

German law and conditions

According to 19 ADS et seq. the assured is obliged - during negotiations of the contract - to disclose all material circumstances which are relevant to for the insurer to assume the risk if they are not common knowledge or which an insurer ought to know in the ordinary course of his business. The ADS provides an indication of which circumstances must be considered as "*material*". These include in particular circumstances that the assured misstated although he guaranteed that they were true as well as those circumstances which he wilfully concealed. If in doubt, all circumstances which the insurer explicitly asked for are considered to be material.

If the assured fails to disclose or misstates material circumstances,



the insurer is discharged from liability. However, this only applies if the assured knew about the circumstance to be disclosed or was unaware of it due to gross negligence. If the insurer knew the circumstance or if disclosure of the material circumstance was omitted without the assured's fault, the insurer remains liable.

Accordingly, the burden is on the insurer to prove that the undisclosed circumstance is material. The assured bears the burden of proving that he did not know about the material circumstance and that the failure to know is not due to gross negligence or wilful misconduct or that the failure to disclose a known circumstance had not been his fault.

DTV-ADS clause 22 does not only refer to the fault and knowledge of the assured as the ADS do, but also to the causative effect of non-disclosure: if the assured proves that the non-disclosed fact neither had an impact on the occurrence of the insured event nor on the insurer's liability under the policy, the insurer remains liable. Compared to the ADS the DTV-ADS are, therefore, more favourable to the assured.

3. Apportionment of common expenses arising out of clause 12-14 of the Nordic plan

Introduction

Clause 12-14 of the Nordic plan provides: *"If expenses have been incurred which are common to repair work for which the insurer is liable and work which is not covered by the insurance, these expenses shall be apportioned on the basis of the cost of each category of work. However, dry dock charges and quay rental shall be apportioned on the basis of the time that the recoverable and the non-recoverable work would have required*

if each category of work had been carried out separately."

Nordic law and conditions

Apportionment of common expenses is regulated by NMIP clause 12 14. This clause has been slightly modified in the 2016 version of the NMIP.

It happens quite frequently that repair works are carried out simultaneously with other owner's work, typically when a vessel is dry-docked at a yard. The common expenses will in these cases have to be apportioned between the repair works and owner's work respectively. The starting point under clause 12 14 is that these expenses shall be apportioned on the basis of the cost of each category of work. However, some of the common expenses are clearly related to time spent and it is explicitly stated in clause 12 14 that dry-dock charges and quay rental shall be apportioned on the basis of the time that the recoverable and non-recoverable work would have required if each category of work had been carried out separately. In the 2016 version of NMIP, the Commentary has been largely rewritten to reflect current adjusting practice with regard to apportionment of common expenses. In practice, most difficulties in the apportionment concern the dry-dock charges and quay rental that shall be apportioned on a *"time-required"* basis. Since both the repair works and the owner's works have been carried out simultaneously, it may be difficult to assess what time would have been required if each category of work had been effected separately. It is particularly important that the appointed surveyors are observant and that it is clear from the surveyors' reports how each category of work have been effected. It is also important for insurers to require full disclosure from the assured with regard to the non-recoverable owner's work in order to assess what time these works would

have taken if they were carried out separately. When it has been properly assessed, then the following example is provided by the Commentary to NMIP:

"If owner's work requires 10 days in dry-dock and casualty repair requires 15 days in dry-dock, the total of all dry-dock related charges shall be apportioned as follows: The sum of 10 days for owner's work and 15 days for casualty repair is 25, and 10/25ths of dry-dock costs are allocated to owner's works and allowed, and 15/25ths are allocated to casualty repair and thereby allowed."

This example is for a situation where there is one casualty and owner's work that would require dry-dock. The scenario can be more complicated where there are two or more casualties together with owner's work requiring dry-dock, or other time related costs. Of course, these issues are for the loss surveyors and adjusters to determine, and it must be accepted to some extent that there will be some discretion in finding a fair and reasonable solution to apportion common expenses.

German law and conditions

The ADS and the H&M conditions of the DTV-ADS do not contain provisions on the apportionment of common expenses. Only the Loss of Hire conditions of DTV-ADS contain express stipulations about simultaneous repair works (clause 77) and removal to the repair yard in the event of simultaneous repair works (clause 78).

Under ADS and the H&M conditions of the DTV-ADS, common expenses are only covered in so far as they are connected with the damage covered. Common expenses are therefore to be apportioned. Dock charges in particular are to be apportioned, in the absence of any other agreement in the policy, on the basis of the



length of time of repairs as assessed by an expert. However, there is no binding precedent on which expenses qualify as common and on what basis they should be apportioned, if at all. Therefore this aspect may turn into a dispute if the policy does not contain a clear agreement in this respect. In some policies this is resolved by a reference to an explanatory note of the Association of Hanseatic Marine Underwriters (VHT-Merkblatt). If so agreed in the policy or if the parties later agree on the applicability of the explanatory note, their content is binding on the parties. The explanatory note contains the following terms as to common expenses, reflecting the German market practice:

1. Common expenses may be dry dock costs, costs connected with the repair and other costs. For each of these categories the explanatory note further defines what kind of cost falls into the respective category and stipulates if and how the costs are to be allocated.
2. Dry dock costs include all costs required to bring the vessel into a dock to repair and/or maintain the vessel including shifting costs, quay rental and surcharges for extra work. All these costs are to be apportioned between the assured and the insurer.
3. Costs connected with the repair are those additional to the dry dock costs and costs for the repair and/or maintenance work. These include, for example, the costs for pilots, tugs and boatman to take the vessel to the shipyard, the costs for the installation of fire fighting equipment and the fire watch. All these costs and the further costs mentioned are to be adequately allocated between the assured and the insurer. Not allocated are, for example, electricity costs if the

vessel is supplied with electricity by its own electricity power supply or the costs for fresh water supply.

4. Other costs include, for example, costs for putting up a watch of the vessel whilst at the shipyard. These costs are allocated on a pro-rata basis.

English law

There is no guidance under the ITC conditions or the Marine Insurance Act 1906. In practice this is likely to be dealt with by the adjuster appointed to adjust the claim. The Association of Average Adjusters have published their Rules of Practice which were the codification of the Customs of Lloyds' in 1876. These have no statutory or contractual weight and are not binding on the parties to an insurance contract, but would doubtless be considered very persuasive by the Court (see the recent decision in *Mitsui & Co v. Beteiligungsgesellschaft LPG (Longchamp)*²).

Section D of these Rules of Practice provides:

1. If the vessel is removed to a repair port as an immediate consequence of the damage for which the underwriters are liable, the whole cost of removal is for the underwriters' account even if the owners also undertake some work for their own account. If the vessel is removed for owner's account (other than routine overhaul) the whole cost is for owner's account. If the vessel is removed for a routine repair at which both owners and underwriters repairs are undertaken the costs will pro-rated in accordance with cost of repair.
2. Fuel and stores consumed during the repairs are to be considered the cost of repairs.

3. If the vessel requires dry-docking, gas freeing or tank cleaning as an immediate consequence of the damage for which the underwriters are liable, the whole expense of entering and leaving the dry-dock, the gas freeing or the tank cleaning shall be for the underwriters even if the owners also undertake some work for their own account. If the vessel requires dry-docking, gas freeing or tank cleaning for owner's account or is dry-docked for a routine dry-docking at which both owners and underwriters repairs are undertaken, the cost of entering and leaving the dry-dock and the dry-dock fees shall be divided equally between both owners and underwriters.

4. "Disposal Costs" in a container casualty

Introduction

As a result of the ever increasing size of container ships, the prospect of resolving a casualty when they occur is formidable. The complexities of container ship fires in particular give rise to many difficulties, including what is to be done with fire-fighting water and damaged containers/cargo. Fire-fighting water can often be extremely hazardous having been subject to reactions with cargo stowed within containers. Often, it is not always possible to know in what way the water may be toxic pending appropriate testing.

This gives rise to the question of which insurance should respond to deal with these losses.

English law and conditions

In our experience, there are a variety of ways in which the expense of removing fire-fighting water can be treated:

2 [2016] EWCA Civ 708



1. On large casualties, often the removal is undertaken by the contracted salvor under LOF. The salvor is often best placed to do this as he has provided the wider salvage services, is familiar with the condition of the vessel and liaising with local authorities to satisfy their requirements. The salvor also funds this cost up front. Under an LOF contract, the salvor's remuneration is pro-rated across all interests and as such each interest contributes. ITC 1.10.83 provide cover for ship's proportion of salvage under clause 11.1.

2. If removal is undertaken by a third party, this is likely to be an expense which would have to be funded by the owner or operator up front which has cash flow consequences.

- The owner could pursue a recovery in general average. This is a lengthy process and may take a number of years until any reimbursement is seen. In general average the party who incurred the expenditure must bear their proportion of that expenditure i.e. only a partial recovery is made. Often it can be very hard to secure general average conditions from cargo interests who may seek to defend them as a result of alleged breaches of the contract of carriage. As with the German conditions the ship's proportion of general average is insured under clause 11.1.

- A curiosity of the English conditions is that clause 11.1 allows an assured to recover the whole of any general average sacrifice from the underwriters before making a recovery in general average from the other parties to the adventure (it does not apply to expenditure). It is

unlikely the removal of fire-fighting water can be considered general average sacrifice to the vessel. However it could be considered as a simple claim for loss of or damage to the vessel under clause 6.1.2. If the water needs to be removed in order for repairs to take place, it is arguable that the water-disposal is a cost of the repair. That said, the exclusion at 8.4.5 in relation to collisions, prevents any recovery for any claim in respect of pollution or contamination of real or personal property or thing whatsoever.

- The owner could consider advancing a claim under the P&I Policy:
 - Most IG policies will include cover for disposing of damaged (and sound) cargo from a damaged ship. Again, if the water removal is necessary for this to take place, a claim could be considered.
 - Similarly, most IG policies include cover for preventing the escape or threat of escape of oil or "any other substance which may cause pollution" including to the extent ordered by local authorities.

Norwegian law and conditions

The NMIP clause 4-7 regulates the insurer's liability for measures to avert or minimise loss. If a casualty threatens to occur or has occurred, the insurer is liable in accordance with the rules in clauses 4-8 – 4-12 for measures taken on account of a peril insured against, provided that the measures were of an extraordinary nature and were reasonable.

The NMIP distinguishes between costs of measures to avert or minimise loss in general average (see clauses 4-8 –

4-11) and costs of particular measures taken to avert or minimise loss (see clause 4-12).

If general average has been declared and the costs related to removal of possibly contaminated fire-fighting water and/or damaged containers/ cargo are allowed as general average expenses, the insurer is, pursuant to clause 4-8, liable for the general average contribution apportioned on the interest insured (i.e. the ship), even if the contributory value exceeds the insurable value, but limited to a total compensation for damage and measures to avert or minimise loss of two times the insurable value (clause 4-18). The requirement is that the general average adjustment is duly drawn up according to applicable rules of law or such terms of contract as must be considered customary in the trade in question.

If general average has not been declared, the costs related to removal of possibly contaminated fire-fighting water and/or damaged containers/ cargo may be recoverable as costs of particular measures taken to avert or minimise loss pursuant to clause 4-12(1) if such measures were undertaken on account of a peril insured against by the hull insurer; for example, measures taken to salvage the ship. If the measures to avert or minimise loss were undertaken for the benefit of several interests, the hull insurer is only liable for such proportion of the loss as may reasonably be attributed to the insured interest. Hence, if such measures are undertaken partly for the benefit of interests insured under the hull policy and partly to the benefit of interests insured under the P&I policy (for example, pollution risk) the hull insurer is only liable for such proportion as may reasonably be attributed to the hull interest.



German law and conditions

Where fire occurs on a containership, this usually poses a risk to the vessel and the cargo. Therefore, fire fighting services will almost certainly be an act of mitigation to avoid further property damage. If the vessel and cargo are exposed to the same peril, this traditionally leads to a general average event. The York-Antwerp Rules provide their own regime on how to deal with such sacrifice and expenditure. The ADS contain provisions on general average as well as on mitigation of damage.

It is likely that the costs associated with disposing of the fire-fighting water would be allowed as an expense under the York-Antwerp Rules (as would any sacrifice damage to cargo caused by the water). ADS only provide cover for general average expenses in relation to sacrifice damage to the vessel and ship's proportion of general average. Therefore, a shipowner who incurs expenses for the good of ship and cargo can only claim from its hull insurer the expenses relating to his contribution in general average (limited to the insured value). Where high general average expenses combine with substantial damage to the hull, the ceiling of cover provided by the sum insured may lead to a situation where not even the ship's contribution to general average is covered any more.

The assured could also consider advancing the claim as sue & labour, under §32 ADS. The assured can claim an indemnity for the expenses incurred to mitigate loss beyond the sum insured. It is settled law that in this context "expenses" are not limited to the intended effects of a mitigating act, but they also include the negative consequences of such acts, at least

if they cannot be avoided, as long as the act remains reasonable under the circumstances. Costs for disposal of firefighting water are such unavoidable costs. As a consequence, they are covered under section 32 ADS. Under the ADS there is no priority of general average over sue & labour, so that the assured can decide under which rules he seeks an indemnity. It is not finally settled whether the indemnity claim is only a partial claim, taking into account that the firefighting was not only intended to save the ship but also the cargo – it more likely to be full cover.

5. Calculation of a constructive total loss

Introduction

With substantial disparity between insured values and market values, the scope for an assured to claim for a constructive total loss is great. The English Courts have recently seen a spate of case considering whether a vessel was a total loss, including *Venetico Marine SA vs International General Insurance Company Limited and Nineteen Others (the IRENE EM)*³, *Suez Fortune Investments Ltd and Piraeus Bank SA v Talbot Underwriting Ltd and others* the *BRILLANTE*⁴ *VIRTUOSO* and the *MV RENOS*⁵. These have resulted in a view that it is now easier for an assured to establish a CTL than it was previously.

English law and conditions

The basic position under English law is provided for by section 60 of the Marine Insurance Act 1906. It states that "*there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not*

be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred."

Clause 19.1 of ITC 1/10/83 qualifies this position by contract and states "*In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value*". Historically this has had the effect of making a CTL harder to establish for an assured who has over-insured his vessel.

In short an assured must establish that the cost of repairing the vessel will exceed its insured value once repaired. The above three cases have provided useful guidance to precisely how this calculation will be undertaken by the Courts:

1. If a vessel is conceivably capable of repair it can not be an ATL. To be an ATL the assured must be irretrievably deprived of it.
2. If an insurer wishes to question the veracity or authenticity of quotes and estimates obtained of repair expenses, they must have cogent evidence in order to succeed.
3. When choosing a yard to undertaken repairs a shipowner should not necessarily elect for the cheapest place of repair, and is entitled to take into account a number of factors including:
 - The risk of the long towage of a dead ship particularly in relation to the risk of damage to the vessel, pollution, grounding or collisions with other vessels.
 - The ability of the respective yards to carry out the repairs on time and on budget.

3 [2013] EWHC 3644 (Comm)

4 [2015] EWHC 42 (Comm)

5 [2016] EWHC 1580 (Comm)



- The quality of workmanship of the respective yards.
 - The financial consequences to the owners of the repair location on future earning potential.
4. The courts appear to be reluctant to allow insurers to defeat claims on the basis of technicalities in relation to NOAs. An assured is entitled to an amount of time sufficient to consider all the evidence available before tendering an NOA (in the most recent case five months). Moreover, selling the vessel is not necessary inconsistent with the assureds' duty to "*continually abandon*" the property.
 5. The costs of repair and recovery before NOA was tendered can be included in the CTL calculation. This may include owners' Article 13 salvage liability, SCOPIC, standby tug expenses at a rate above market and sue and labour expenses.
 6. An assured is entitled to a "*large margin*" in addition to any contingency allowed by the repair yard in their estimate, to recognise that it was not possible to fully determine the extent of the damages and the fact that other items may have to be replaced which were not envisaged in surveys.

These decisions indicate that the courts are willing to give owners a large amount of latitude when it comes to CTL claims. It would appear that the benefit of the doubt will be afforded to the assured when calculating a CTL.

Norwegian law and conditions

The Norwegian conditions comparable to the "*constructive total loss*" under English law is found in the NMIP clause 11-3 on "*condemnation*". The insured may claim compensation for total loss

if the conditions for condemnation are met.

The main condition is that the ship has suffered casualty damage where the costs of repairing the ship will amount to at least (i) 80% of the insurable value, or (ii) 80% of the value of the ship after repairs if such value is higher than the insurable value.

The term "*insurable value*" is defined in NMIP clause 2-2 as the full value of the insured interest at the inception of the insurance, normally fixed to a certain amount by agreement between the insurer and the assured, referred to as the "*agreed insurable value*". The sum insured will be deemed to constitute the agreed insurable value unless the circumstances clearly indicate otherwise.

If the casualty damage repair costs amount to at least 80% of the said insurable value (typically the sum insured), the vessel will be considered subject to "*condemnation*" and the assured may claim compensation for total loss. The other alternative – that the repair costs amount to at least 80% of the value of the ship if such value is higher than the insurable value – is most practical in the event that the ship is undervalued and the real value in repaired condition is higher than the agreed insurable value. Using the higher of the two values ensures that the assured will not have any easier access to a total loss compensation by using a particularly low insured value or by claiming condemnation in a low market and thereafter receive the higher insurable value.

As evident from the above, the agreed insurable value is an important element when determining whether the conditions for condemnation are fulfilled. Pursuant to clause 2-3, the insurer may demand to have the agreed insurable value set aside if the person effecting the insurance has given misleading information

about the characteristics of the insured interest that are relevant for the agreement. Furthermore, if, due to market fluctuations, the value of the ship has changed significantly after the insurance contract was entered into, both parties may require that the agreed insurable value be changed by giving fourteen days' notice. Furthermore, clauses 2-4 and 2-5 regulates the effect of under- and over-insurance. Most important is clause 2-5, which states that if the sum insured exceeds the insurable value, the insurer shall only compensate the loss up to the insurable value and furthermore, that if the ship is over-insured with fraudulent intent, the contract is not binding on the insurer.

It is only repair costs arising from casualty damage that shall be taken into account when calculating whether any of the alternatives for condemnation may apply. However, the estimation of the costs of repairing the ship shall include all costs of removal and repairs which, at the time when the request for condemnation is submitted, must be anticipated if the ship is to be repaired. Salvage is not to be included.

German law and conditions

The German clauses comparable to the "*constructive total loss*" are clauses 77 ADS and clause 61 DTV-ADS. These clauses deal with the requirements under which the assured can claim the difference between the sum insured and the net proceeds of a sale by public auction or, in case of the DTV-ADS, the remaining value of the vessel. For this the vessel must either be in a condition beyond repair or unworthy of repair. Both need to be ascertained by an expert procedure stipulated in sec. 74/ 63 DTV-ADS. In case of the DTV-ADS, however, this only applies if such an expert procedure is requested by either the assured or the insurer.



A vessel is beyond repair when either a repair is impossible or the vessel cannot be repaired at the current place and cannot be towed to a place where repairs would be possible. In many of these cases the vessel also qualifies as an actual total loss – e.g. the sinking of the vessel in waters so deep that it cannot be salvaged. In these cases the assured may elect whether he wants to claim an actual total loss or whether he wants to claim under clause 77 ADS or clause 61 DTV-ADS. The result will mostly be the same as usually the vessel will be worth next to nothing and be unsaleable

More akin to a “*constructive total loss*” are cases where the vessel is unworthy of repair, namely when the repair costs exceed the sum insured. Hence, it will be more difficult for an insured to establish that the vessel is unworthy of repair if the insured value is higher than the repaired value. DTV-ADS contain an express clause that salvage remuneration is to be included in the repair costs however this is disputed in the context of ADS due to the fact that the salvage is not part of the repair. However, according to both, ADS and DTV-ADS the cost of moving the vessel to another repair yard is to be included. Excluded are expenses for damages that are not insured including special compensation payable under Art. 14 of the 1989 International Convention on Salvage or expenses based on a SCOPIC clause.

Under ADS the assured must inform the insurer “*without undue delay*” that he intends to claim under clause 77 ADS. “*Without undue delay*” is a rather short period and normally not longer than two weeks. However, time does not start to run until the assured knew that the casualty was likely to satisfy clause 77 ADS. By contrast, the DTV-ADS do not contain a time limit within which the assured must decide whether he claims the sum insured in

accordance with 61 DTV-ADS. In either case the assured is bound once the insurer has accepted the right of the assured to claim under 77 ADS/ 61 DTV-ADS. Before that and before it has been ascertained that the requirements of 77 ADS/ 61 DTV-ADS are met the assured may also claim for partial damage and sell the vessel by private sale in unrepaired condition.



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Alex has spent time in the firm’s Dubai office and has undertaken a secondment to the legal department of an oil major.

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