

Impact of Implementation of Insurance Act 2015

Taking into account stance adopted by UK based P & I Clubs

1. Introduction

Over 60% of gross premium volume of Shoreline Passenger Solutions (“SPS”) insurance and reinsurance facility comes in as a reinsurance of International Group of P&I Clubs (“IG”). By accepting reinsurances of the clubs, the lineslip that SPS administers is subject to clubs’ Rules. Eight of the thirteen Clubs in the IG issue Rules that are subject to the laws of England and Wales, including MIA 1906 and are, therefore, affected by the Act. In anticipation of the Act coming into force the eight clubs concerned have said that they will be making changes to their Terms and Conditions in the interests of consistency across the wider IG. These Rule changes have been notified to individual Members by their P&I Clubs and are in force for the 2016 policy year. An entry with Gard, amongst others, therefore, is not affected.

In advance of these Rule changes the Clubs concerned have indicated their intention to “contract out”, of the Act which, under the provisions of the Act, means that the Clubs intend to insert a “disadvantage term” into the Rules with the effect that members will be in a worse position than they would be under the provisions of the Act. The Clubs intend to contract out in respect of the following provisions of the Act:

- (i) Removal of proportionate remedies available to insurers in the event that the duty of fair presentation is breached and to insert a disadvantageous term which retains the current sole remedy of avoidance of the policy;
- (ii) Retaining the existing remedy for a breach of warranty, namely the automatic and permanent discharge of the insurer’s liability from the date of the breach of warranty, rather than allowing member to have the benefits of the changes brought in by the Act. Under section 10 of the Act warranties become “suspensive” conditions with the effect that cover is suspended only for the period that the member is in breach of the warranty. The insurer has no liability during the “suspended period” for any loss occurring; and/or any loss which is attributable to something happening during the “suspended period”. Such benefits will be lost following the Club’s intention to contract out;
- (iii) Removal of the new provision as section 11 of the Act which prevents an insurer from relying on a breach of warranty or other policy term to avoid paying a claim in circumstances where that breach could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Consequently, the Clubs will be able to rely on an irrelevant breach of a policy provision to avoid liability for a claim; and
- (iv) Exclude the Act’s provisions on the continuing validity of policies following a fraudulent claim by a beneficiary who is not specifically named in the terms of entry, such as an entity associated with or affiliated to a Member against whom a covered claim is enforced.

The Act abolishes and prohibits ‘Basis of contract’ clauses which have the effect of converting pre-contract undertakings into warranties. The Rules of the Clubs affected by the Act currently contain

‘basis’ clauses and as such these basis of contract wordings will be deleted. In future any inaccuracies in material representation will be considered under the principles and provisions in the Act relating to a fair presentation of the risk.

2. Issuing Evidence of War Insurance

In issuing a War Blue Card, SPS's insurers and/or the clubs that do agree to issue Athens Blue Cards sign on to:

“This is to certify that there is in force in respect of the above named ship . . . a policy of insurance satisfying the requirements of Article 4 bis of the Athens Convention . . .”

Effectively a guarantee with limited opportunity to defend/escape liability.

⇒ Any remedy that SPS insurers might seek either out of the Insurance Act or per contracted out provisions being applied by the clubs following misrepresentation has to be addressed through building in a right of recovery from policyholders following settlement of the claim.

3. How do the Clubs tackle similar situations?

A)

Provision of a Blue Card is equivalent to the provision of security. To the extent that the Club incurs a liability under the Blue Card the Member is obliged to indemnify the Club save if the claim is one covered by the Terms and Conditions /Certificate of Entry. Of course, there would be no cover if that had been lost/prejudiced say by imprudent trading, fraud or misrepresentation etc. following which cover could be cancelled.

NB: the residual exposure under the Blue Card (its 30 day lifespan beyond cancellation or until replaced by another club's Blue Card).

Britannia Rule 31 (5)

(A) The Association is under no obligation to provide bail or other security on behalf of any Member, but where the same is provided it shall be on such terms as the Managers may consider appropriate and shall not constitute any admission of liability by the Association for the claim in respect of which the bail or other security is given. In no case shall cash deposits be made by the Association.

(B) It shall be a condition of the provision of bail or other security on behalf of any Member, that the Member shall indemnify the Association for any costs associated with the provision of such bail or other security and for any liability the Association may incur to a third party under or in connection with such bail or other security. *Provided always that the indemnity shall not extend to those amounts that the Member would have been entitled to recover from the Association under these Rules had he paid them directly.*

B)

The Clubs have agreed to offer the requisite guarantees required by Maritime Labour Convention 2006. Should they have to make payments in order to repatriate seamen following the insolvency of the shipowner, they have sought to vest themselves with a right of recovery via a proviso such as that in:

UK Club Rule 2 Section 4

(a) where the Association is under no liability in respect of the claim by reason of a cesser under Rule 29A or cancellation under Rule 31, the Association shall nevertheless discharge or pay a claim under Section 4C . . . but only as agent of the Owner and the Owner shall re-imburse the Association in full for such claim;

In effect this proviso then entitles the Club to lodge a claim to recover any disbursements they have made with the liquidator.

Conclusion: Para A) above provides the closest parallel for SPS purposes, but B) should be catered for as well

4. Proposal

C)

To bring SPS's Binder for direct business into line with the clubs that are reinsured, insert new Section 9 Insurance Act 2015:

The following provisions of the Insurance Act 2015 ("the Act") are excluded from the Terms and Conditions of this contract as follows:

a. Section 8 of the Act is excluded.

As a result any breach of the continuing duty of fair presentation shall entitle Insurers to avoid the policy, regardless of whether the breach of the duty of fair presentation is innocent, deliberate or reckless.

b. Section 10 of the Act is excluded.

As a result all warranties contained within these Terms and Conditions must be strictly complied with and if the Owner fails to comply with any warranty Insurers shall be discharged from liability from the date of the breach, regardless of whether the breach is subsequently remedied.

c. Section 11 of the Act is excluded.

As a result the Terms and Conditions of this contract of insurance, including terms which tend to reduce the risk of loss of a particular kind, loss at a particular location and/or loss at a particular time, must be strictly complied with and if the Insured fails to comply with any such term, the Association's liability may be excluded, limited or discharged in accordance

with these Terms and Conditions notwithstanding that the breach could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

d. Section 13 of the Act is excluded.

As a result Insurers shall be entitled to exercise their right to terminate this contract of insurance in the event that a fraudulent claim is submitted by or on behalf of the Insured and/or any Affiliate.

e. Section 13A of the Act is excluded.

As a result the Terms and Conditions of this contract of insurance shall not be subject to, nor shall Insurers be in breach of, any implied term that it will pay any sums due in respect of a claim within a reasonable time save where the breach is deliberate or reckless and Section 13A of the Act is excluded to this extent.

f. Section 14 of the Act is excluded.

As a result, this contract of insurance shall be deemed to be a contract of the utmost good faith, and any breach of the duty of the utmost good faith shall entitle Insurers to avoid this contract of insurance.

D)

Add new Section 6: Provision of Certificate of Insurance

Insurers are under no obligation to provide security on behalf of any Insured, but where the same is provided it shall be on such terms as the Insurers may consider appropriate in the context of Athens 2002 PLR and shall not constitute any admission of liability by Insurers for the claim in respect of which the bail or other security is given. In no case shall cash deposits be made by Insurers.

Having either provided security or paid claims in compliance with the terms of Athens 2002 PLR, Insurers shall be entitled to seek to be indemnified for any costs associated with the provision of such security and for any liability Insurers may incur to third parties

Provided always that this indemnity shall not extend to any amounts that the Insured would have been entitled to recover from Insurers under this contract had he paid them directly.