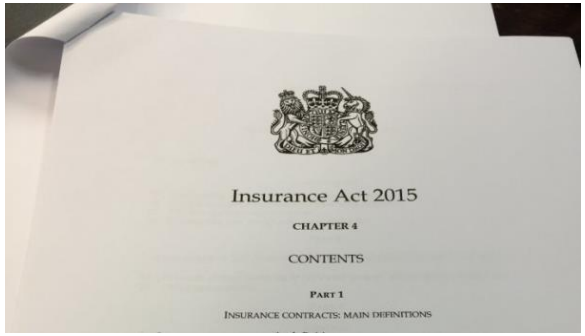
Chiara Falasco

UK Insurance Act 2015 and Marine Insurance Policies: the point of view of a continental lawyer

Studio Legale Garbarino Vergani


Insurance Act 2015

CHAPTER 4

CONTENTS

PART 1

INSURANCE CONTRACTS: MAIN DEFINITIONS

What's the news

Insurance Act 2015, received Royal Assent on 12th February 2015 and came into force on 12th August 2016

Which is the framework

- Marine Insurance Act 1906 (MIA 1906)
- Insurance standard forms
- Continental insurance policies applying English insurance clauses

SUMMARY

- Continental and common law jurisdictions in Hull & Machinery Insurance policies
- H&M Insurance coverages: Italian "Polizza Camogli", English and Norwegian forms
- Amendments to the Marine Insurance Act 1906 brought by the Insurance Act 2015
- Will these amendments really affect the existing marine insurance market?

Continental and common law jurisdictions in Hull & Machinery Insurance policies

what's in common

the subject of the coverage

→ damages to the vessel caused by a marine accident

what's the difference

the mechanism of the coverage

Continental system → *ALL RISK INSURANCE*

- The insured shall prove that (i) the damage occurred during the term of the coverage and (ii) the risk causing the damage is "accidental" and it is a "marine risk". The list of accidental marine risks is merely illustrative

- The insurer shall prove that the loss has been caused by an excluded peril (usually, perils covered by war insurance, wear & tear, standard exclusion as radioactive contamination….)

English system → *NAMED PERILS INSURANCE*

- The insured shall prove that (i) the damage occurred during the term of the coverage and (ii) the risk causing the damages belong exactly to one of the accidental marine risk indicated by the coverage. The list of accidental marine risk is fixed.

The main difference between the two systems

the BURDEN OF THE PROOF in case of damages

- **Continental system**

The burden of proof lays on the insurer to prove that the loss has been caused by an excluded peril

- **English system**

The burden of proof lays on the assured to prove that loss has been caused by a peril insured against

Who bear the risk of the marine accident in case its cause remains unknown?

- **Continental system**

It remains upon the Underwriters, provided that the Insured satisfied the conditions above said

- **English system**

It remains upon the Insured, who failed to prove that the risk causing the damage belongs to the list of the coverage

H&M Insurance coverages
Italian "Polizza Camogli"
English and Norwegian forms

English H&M forms are often preferred also in Continental Insurance contracts by Marine Insurance Industry as standard contract clauses allow:

- uniform collection of the risks
- more efficient application of the coverage

Positive effects of English standard insurance clauses

- Easier negotiations between the Insurers, the Insured/the Bank
- Easier draw up and running of co-assurance contracts
- Easier the re-insurance of the risk in the English market

Negative effect

- Difficulties in applying English clauses in non-common law jurisdictions

Two alternatives to combine English and continental clauses in insurance contracts

1) **General conditions** of the continental legal jurisdiction + **Special conditions** of the common law jurisdiction as *partial exemption* to the general condition

2) **Essential framework** of the coverage based on the continental system + **Coverage conditions** ruled by English form

"Polizza Camogli"

- It consists of 13 clauses, representing the essential clauses ruled by Italian law, that cannot be derogated by the special conditions ruled by the English forms
- Insurance coverage to be applied is the English form as a whole
- English clauses shall be construed and applied as they are construed and applied in English jurisdiction

"Polizza Camogli"

Art. 1 Conditions of insurance

The insurance is granted at the conditions of the attached Clauses of the Institute of London Underwriters, as indicated in art. 1 of the "Additional Conditions", where the expressions "for use only with the marine policy form" and "this insurance is subject to English law and practice" referred to in the heading are deemed to be cancelled

Art. 2 Law governing the contract and interpretation of the English Clauses

This contract is governed by Italian Law. The English Clauses attached to this Policy must nevertheless be interpreted and applied as they are interpreted and applied in England.

Art. 3 Jurisdiction and competent Court

Any dispute in connection with this Contract is solely subject to Italian jurisdiction. Competent Court at plaintiff's option is solely the one of the place of residence of the Head Office of the Company or the Agency having in charge this contract or where this contract has been concluded

ENGLISH FORMS

INSTITUTE TIME CLAUSES HULL (ITCH) 1983

- *Additional perils clause*

It extends the coverage to "*any accident*", similarly to the all risk insurance policy

- *Classification clause*

Breach of a *classification clause* amounts to a breach of warranties

(*Cantieri del Mediterraneo S.p.A. vs Assicurazioni Generali S.p.A., SIAT, Reale Mutua di Assicurazioni S.p.A., Trib. Genoa, 8th October 2013*)

CLASSIFICATION CLAUSE

4.1 It is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance to ensure that

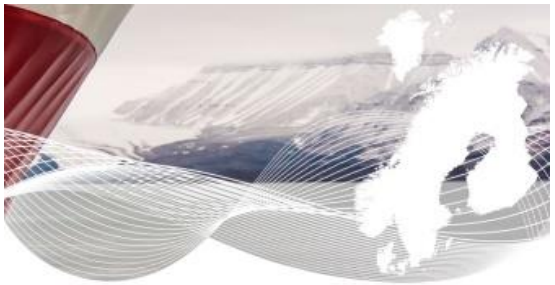
4.1.1 the Vessel is classed with a Classification Society agreed by the Underwriters and that her class within that Society is maintained,

4.1.2 any recommendations requirements or restrictions imposed by the Vessel's Classification Society which relate to the Vessel's seaworthiness or to her maintenance in a seaworthy condition are complied with by the dates required by that Society.

4.2 In the event of any breach of the duties set out in Clause 4.1 above, unless the Underwriters agree to the contrary in writing, they will be discharged from liability under this insurance as from the date of the breach provided that if the Vessel is at sea at such date the Underwriters' discharge from liability is deferred until arrival at her next port.

4.3 Any incident condition or damage in respect of which the Vessel's Classification Society might make recommendations as to repairs or other action to be taken by the Assured, Owners or Managers must be promptly reported to the Classification Society.

4.4 Should the Underwriters wish to approach the Classification Society directly for information and/or documents, the Assured will provide the necessary authorization.



NORDIC MARINE INSURANCE PLAN 2013

- Formal institutional framework: shipowners (Nordic Ship Owner Associations) and insurers (Nordic Association of Marine Insurers) in Scandinavian (Norwegian, Sweden, Finland, Denmark)
- Reviewed every three years by a Standing Revision Committee
- Applied together with the official *Commentary* to the policy
- Frequently used as an alternative to English Forms
- *All risk* coverage principle with exceptions (perils covered by war insurance, wear and tear, standard exclusion such as radioactive contamination, chemical, biological weapons…

MARINE OR WAR PERILS AS CAUSE OF THE LOSS

- **NMP 2013**

It should be assessed the dominant cause of the loss. In case it is impossible to ascertain the dominant cause, the loss may be apportioned 50/50 to each policy

- **ITCH 83**

The loss must be placed 100% on one or the other policy

→ NMP cover against marine perils should not be combined with a war cover based on another system such as ITCH

BRIDGING CLAUSE

Insurance policies referring to standard foreign forms often include the so called "Bridging clause"

"Insofar as this insurance is subject to standard foreign clauses, plans or codes, these shall be given the same construction as they are given in the market to which they belong.

Save for such construction, this insurance shall be subject to English law and practice and to the exclusive jurisdiction of the English Courts."

Art. 2 of "Polizza Camogli" dating 1988 is the first example of "*bridging clause*"

Amendments to the Marine Insurance Act 1906 brought by the Insurance Act 2015

- First act dedicated to insurance contract law as a whole
- Default regime with contract-out option
- Transparency and certainty of the relationship between policyholders and insurers
- Business and consumer insurance, save for the duty to make a fair representation

How Insurance act 2015 applies

<u>It does not apply retrospectively</u>

- The new duty of fair representation & the new effect of a breach of good faith:

insurance contracts entered into on/after 12th August 2016 and to variation agreed on/after 12th August 2016 in respect of contract agreed at any time

- The new law on warranties, terms not relevant to the actual loss and fraudulent claim:

insurance contracts entered into on/after 12th August 2016 and to variations to such contracts

THE AMENDMENTS

- Duty of fair representation
- Warranties and terms not relevant to the actual loss
- Fraudulent claims
- Contracting out
- Good faith
- Late payment of claims

DUTY OF FAIR REPRESENTATION

- Replace the previous duty of disclosure and apply only to business insurance
- Whose knowledge is relevant, what information shall be disclosed and how such information shall be disclosed
- Positive obligation on insured to undertake researches for information
- Positive duty of inquiry for the insurer

REMEDIES FOR NON-DISCLOSURE / MISREPRESENTATION

- **Previous system:** fraudulent claim rule

The fraud defeated the entirety of a claim without distinction between a fraudulently exaggerated claim and a justified claim supported by "collateral lies"

Supreme Court, Versloot Dredging BV and Anotehr v HDI Gergling Industrie Versicherung AG and Others (The "DC Merwestone", 16-17 March; 20 July 2016)

- **New provisions:**

a) Avoid the policy and the keep the premium: when the breach was deliberate or reckless

b) Proportionate remedies in all other cases:

→ Policy avoided with return of premium when the insurer would have declined the risk;

→ Contract should be treated as if it included the term the insurer would have included in accepting the risk, irrespective whether the insured would have accepted that term or not;

→ Claim should be scaled down proportionally to the higher premium that would have been charged by the insurer in accepting that risk

WARRANTIES

BREACH OF WARRANTIES
AND
TERMS NOT RELEVANT TO THE ACTUAL LOSS

- **Previous system**

  → the breach cannot be remedied

  → Insurer may avoid liability even if the breached term is not related to the cause of loss claimed

Breach of warranties and Terms not relevant to the actual loss

- **New provisions**

  → all warranties are converted in "*suspensive conditions*"

- ✓ The insurer shall be liable for losses occurred after the breach has been remedied

  → to avoid liability, there must be a connection between the breach of any term and the actual loss suffered by the insured

- ✓ Onus to prove lack of connection is on the insured
- ✓ Only exception: terms which define the risk as a whole (*ex. terms restricting the use of a property*)

It makes harder for insurers to avoid claims as a result of technical breaches by the insured

FRAUDULENT CLAIMS

- **Previous system**
  Fraudulent claim is a breach of the duty of utmost goods faith entitling the insurer to avoid the policy. Applied restrictively by case law.

- **New provisions**
  Policyholders forfeits the whole claim → cannot recover even the part of the claim that would genuinely have been payable

- ✓ Insurer may refuse any claim arising after the fraudulent act
- ✓ Insurer can serve notice of termination from the date of the fraudulent act (*not from the discovery of it*) with two effect:
  → previous valid claim are unaffected
  → the insurer shall not return premium

In case of group insurance cover → the insurer has a remedy against the fraudulent member but it will not affect the other members of the group and the policy as a whole

CONTRACTING OUT

- Agreement on terms less favorable to insured is possible, provided that two transparency requirements are satisfied:

  a) Insurer must draw insured's attention on the contract/terms opted out
  b) Disadvantageous terms must be clear and unambiguous as to their effects

- The prohibition of the "basis contract clauses" shall not be contracted out

- Contracting out provisions shall not apply to settlement agreements

Good Faith

- Remedy of avoidance of the policy for the breach of utmost good faith provided by section 17 of MIA 1906 is abolished

- Insurance contracts will still be based on utmost good faith principle as they shall be interpreted in a way that favours compliance with this duty

Late payment of claims

- It only applies to insurance contracts entered into after 4 May 2017 (Insurance Act 2015, s 13A, as amended by Enterprise Act 2016)
- It introduces the remedy of "*damages for late payment of insurance claims*" against the well settled English principle "*no damages on damages*"
- What is a "reasonable" delay, whether the insurer had reasonable grounds to deny the claim, what amount of damages could be considered appropriate

CONCLUSION

Will these amendments really affect the existing marine insurance market?

- Insurance English law and practice applies far behind UK boundaries through the widespread use of standard English insurance forms by the marine insurance market
- Warranties and Terms not relevant to the actual loss are expressly included in the wording of English standard form so they apply as amended by Insurance Act 2015 also to Marine Insurance Policies including English standard clauses
- All the other amendments brought by Insurance Act 2015 do not have impact on the state of continental Insurance law, as Marine Insurance covers are ruled by the law of the jurisdiction where they apply
- How the new provisions will be construed and implemented by the English practice in the next years and how the new provision will impact on the "continental" insurance policy is matter for the next Court cases

THANK YOU FOR YOUR ATTENTION

Genova
Salita S. Caterina 4/11 - 16123 - T: +39 010 5761161 - F: +39 010 5958708 - E: garbamar@garbamar.it - *Head Office*
PIVA e CF 03557340100

Palermo
Via Emerico Amari , 8
90139 Palermo
T: +39 091 8486010
F: +39 091 8486010

Trapani
Via dell'Assunta, 83
91100 Trapani
T: +39 0923 1851858
F: +39 0923 1851858

Taranto
Corso Vittorio Emanuele 17
74122 Taranto
T: +39 099 9908000
F: +39 099 9908000

Luxembourg
c/o BSP - 2, rue Peternelchen Imm. C2
L-2370 Howald | Luxembourg
T: +352 26025 - 1
F: +352 26025 - 999